No. 95-897

In The

Supreme Court of the United States

October Term, 1995

Supreme Court, U.S.
FILED
AUG 27 1996
CLERK

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

vs.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, GRAND LODGE OF THE FRATERNAL ORDER OF POLICE AND THEIR AFFILIATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. *The FLSA Post-1991 Salary Basis Test & The Public Sector.* Does the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, salary basis/disciplinary docking test, 29 C.F.R. § 541.118(a)(5), remain applicable in the public sector after the Department of Labor's 1991/1992 revision of 29 C.F.R. § 541.5d?

2. *The FLSA Salary Basis Pay Docking Rule: "Subject to" or "Actual."* Does a clear, intentionally established, disciplinary code subjecting employees to non-safety discipline for less than a full pay period prevent exemption under 29 C.F.R. § 541.118(a)(5)?

3. *The FLSA Salary Basis "Window of Correction".* Is employer entitlement to the 29 C.F.R. § 541.118(a)(6) "window of correction," which permits an employer to escape the loss of an FLSA exemption for impermissible pay deductions, limited to cases where there is (a) actual inadvertence, (b) full reimbursement immediately upon discovery, *and* (c) full revocation of all code, rules, practices or procedures subjecting the employees to impermissible deductions?

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THE INTEREST OF THE *AMICI CURIAE* FOP AND IUPA

The *amici* organizations represent the majority of working law enforcement officers in the United States. The only other such national organization, National Association of Police Organizations, has filed a separate brief in support of Petitioners. The *amici* have obtained consent from both parties to file this brief. This brief supports the Petitioners' argument that the decision of the Eighth Circuit should be reversed.

The Grand Lodge of the Fraternal Order of Police is an international organization of full-time law enforcement officers employed by federal, state or local government agencies. It's 1,982 local lodges comprise a total membership of 265,451 active members. The Fraternal Order of Police was founded in 1915 in Pittsburgh, Pennsylvania and is currently incorporated under the laws of the State of Pennsylvania. The Grand Lodge serves 39 affiliated state lodges (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming). The Grand Lodge also has two international affiliates in Canada and Ireland. The Grand Lodge Auxilary was formed in 1941. The Grand Lodge of the Fraternal Order of Police has its headquarters housed in Nashville, Tennessee, and maintains offices in Washington, D.C., as well.

It historically has been, and continues to be, a responsibility of the Grand Lodge to educate members on issues that may impact the terms and conditions of employment afforded law enforcement professionals. As part of fulfilling that responsibility, the Grand Lodge informs members about national legislation affecting those areas, as well as crime control measures, and attempts to influence such legislation. Included

among such matters is the Fair Labor Standards Act ("FLSA").

The Grand Lodge is governed by a Board of Directors composed of National Trustees elected by each respective state lodge and an Executive Board composed of the President, 1st Vice-President, 2nd Vice-President, Secretary, Treasurer, and Sergeant-at-Arms. The members of the Executive Board are elected by the delegates present at Biennial Conference of the Grand Lodge.

The St. Louis Police Officers Association, FOP, represents 1,300 police officers in the St. Louis Police Department. It is affiliated with the Grand Lodge of the FOP through the Missouri Lodge.

The International Union of Police Associations, AFL-CIO, is the law enforcement parent of the police unions within the American Federation of Labor and Congress of Industrial Organizations. It is composed of three hundred and seven affiliated police unions and associations representing over 80,000 street level law enforcement officers in over four hundred law enforcement agencies throughout the United States, Canada and Mexico. The IUPA regularly represents the rights of individual law enforcement officers concerning their wages, hours, benefits, professional standing, and legal rights. IUPA and its affiliates have been involved in more than 40 Fair Labor Standards Act ("FLSA") enforcement actions through out the country.[1]

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1. *E.g., Clancey v. Alexandria*, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989); *Rutledge v. Jackson*, Case No. J87-0342(W) (S.D. Miss. Nov. 3, 1989); *Milwaukee Police Association v. Milwaukee*, Case No. 88-C-412 (E.D. Wisc. 1990); *Kessler v. Howard County*, Case No. 92-1098 (4th Cir. 1992); *PPOA v. Los Angeles County*, Case No. Civ. 91-1772 WJR (GHKX) (C.D. Cal. April 13, 1992); *Amshey v. United States*, Case No. 583-86 (Fed. Cl. Ct. 1992); *Ahern v. New York*, 807 F. Supp. 919 (N.D.N.Y. 1992); *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Moreau v. Klevenhagen*, 508 U.S. 22 (1993); *DeBraska v. Milwaukee*, Case No. 96-C-402 (E.D. Wisc.) (case pending).

The IUPA's Executive Officers are President Sam Cabral, Secretary-Treasurer Rich Estes and Vice President Art Reddy. Fifteen members of the Executive Board are elected by the members' delegates nationwide. The IUPA meets in Convention biannually and holds a National Conference in the intervening years.

The I.U.P.A. assisted St. Louis Police Fraternal Organization, represents the majority of Sergeants and Lieutenants in the St. Louis Department.

Law and order and the need for increased, reformed vigilance by working law enforcement is a clear national priority. Similarly, America needs a national hours of work standard for our working law enforcement officers to ensure both sufficient and vigilant law enforcement coverage. The FLSA sets that national hours of work standard for law enforcement at up to 171 hours in a 28 day period. 29 U.S.C. §207(k).

Broad, liberally construed, easily obtained exemptions from the national hours of work standard undermine the standard itself by, as happened here, exempting a large middle segment of the work force. The larger the segment exempted from the standard, the more easily the standard itself is defeated and its very purposes are undermined.

The limited resources,[2] and related public sector non-

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2. The Government Accounting Office reported that the time spent on FLSA enforcement declined from 558 staff-years in 1981 to 474 staff years in 1984. U.S. General Accounting Office. *Report to the Chairman Subcommittee on Labor Standards Committee on Education and Labor House of Representatives: The Department of Labor's Enforcement of the Fair Labor Standards Act* (September 30, 1985). Since the initial enactment of the Fair Labor Standards Act Amendments of 1985, which most recently brought public safety employees under a national hours of work standard, the budget of the Wage and Hour Division of the Department of Labor has continued to decline, its staff has continued to be depleted, and its enforcement authority

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enforcement policy of the U.S. Labor Department's Wage and Hour Division,[3] leaves enforcement responsibility of the

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remains limited. For example, during fiscal year 1989, the Department had sufficient resources to conduct almost 76,000 investigations. Just one year later, that number decreased such that it investigated barely 74,000 complaints. *See* U.S. Department of Labor Employment Standards Administration, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Report to the Congress Required by the Fair Labor Standards Act 1991 Section 4(d)(1)*(1989) and (1993). These reductions continue with each new federal budget.

In addition, the majority of the Department's resources must be spent in the private sector. In both 1989 and 1990, of the more than 70,000 complaints investigated by the DOL, less than 2,000 were in the public sector. *Id.*

3. On November 19, 1985, the DOL published an Advance Notice of Proposed Rulemaking in the Federal Register seeking comments concerning the salary basis test. A representative of public employers commented that due to state and local laws governing public accountability, some public employers were required to make part-day deductions for all employees without distinction. As a result of this comment, the Department of Labor declared on January 9, 1987, that it would not enforce the part-day docking portion of the salary basis test against any public sector employee *who otherwise met the requirements for exempt status*, provided the applicable state or local law *required* the employer to deduct pay for absences of *less than a day* for public accountability reasons. *See* DOL Opinion Letter Ruling, January 9, 1987.

DOL's nonenforcement policy did not affect the employee's right to go to court to enforce all parts of the Fair Labor Standards Act including the part-day docking section of the salary basis test. 29 U.S.C. § 216(b). The remaining portions of the salary basis test, including the disciplinary docking rule, remained in effect and enforceable. 29 C.F.R. § 541.118(a)(5). Pet. App. at 82a.

However, the non-enforcement policy had the unintended consequence

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exemption provisions of the Act as they apply to law enforcement solely up to individual law enforcement employees and their organizations.[4] The Grand Lodge of the Fraternal Order of Police and the International Union of Police Associations, AFL-CIO, take that responsibility seriously and have been active in efforts to enforce the Act.

The Grand Lodge of the Fraternal Order of Police regularly publishes a Fair Labor Standards Act Update and provides seminars on FLSA across the country. The International Union of Police regularly publishes an FLSA handbook entitled *Policing Your Paycheck*, runs annual conferences and seminars on enforcement and provides legal counsel in FLSA litigation through its office of general counsel.

The *amici* are keenly interested in continued strict enforcement of a national hours of work standard for working law enforcement officers and strict and narrow application of exemption from that standard.

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of placing the FLSA enforcement burden on individuals and organizations such as the *amici* which generated a situation in which, as the United States explained in its *amicus curiae* brief, most of the twenty-seven Court of Appeals "cases upon which petitioners rely were decided without a clear statement by the Department of Labor." *See* Solicitor General's *Brief for the United States Amicus Curiae* (May 1996).

4. Since the DOL's nonenforcement policy of 1987, private party enforcement under 29 U.S.C. § 216(b) has been the only litigation enforcement of the FLSA exemption standards as they apply to law enforcement employees. *E.g., Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995); *see also*, n. 3.

STATEMENT OF THE CASE

The Petitioners in this case are 289 Sergeants and one (1) Lieutenant of the St. Louis Police Department, St. Louis, Missouri. The St. Louis Police Department has, at all relevant times, treated the Sergeants and Lieutenants as exempt from the overtime provisions of the FLSA. Although the Sergeants and Lieutenants work in excess of the statutory maximum hours, they are not paid for that work except in unusual circumstances, as when they are working under federal grants.[5] J.A. at 79.

Despite the cursory designation of the Sergeants and Lieutenants as exempt, the St. Louis Police Department has an express policy which subjects the Sergeants and Lieutenants to disciplinary deductions in pay of less than one week for any of approximately 40 different Departmental violations. *See* Pet. App. G., 102a. Sergeants in St. Louis are in fact suspended for periods of less than a week for disciplinary reasons. J.A. 48-57, 60-62, 85-87. The Petitioners' sick leave, vacation pay, and recreation pay are all calculated and used on an hourly basis. J.A. at 11, 47 and 58. Sergeants and Lieutenants receive shift differential pay for each hour worked during the "midnight" shift. J.A. at 77.

The St. Louis Police Department has never completely reformed its policy of subjecting Sergeants and Lieutenants to disciplinary deductions in pay of less than one week. In addition, the Department intends to maintain its two day deduction from Sgt. Guzy until given a final order by the courts to reimburse him.

The Petitioners brought this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988

5. Law enforcement Sergeants and Lieutenants in the federal sector are covered by the salary basis test and its "subject to" discipline rule and are non-exempt. *See Amshey v. United States*, 26 Cl. Ct. 582 (Fed. Cl. Ct. 1992).

challenging the Department's treatment of them as exempt under the FLSA. Pet. App. 68a-102a. On August 26, 1994, the District Court found that all but two Sergeants' positions were exempt. Pet. App. 67a-68a. On September 8, 1995, the Eighth Circuit affirmed the decision and reversed the decision in part ruling that all the Sergeants' positions were exempt. Pet. App. 1a-36a.

Although the District Court did not expressly discuss the salary basis test, except in its 1991 summary judgment decision for Lt. Delgado, the Eighth Circuit ruled that the Sergeants are salaried because "[t]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status." Pet. App. at 8a. The Court did note, however, that "an employee is considered nonsalaried, and thereby entitled to overtime compensation, if his compensation is subject to reduction for a violation of any other [non-safety] rules." Pet. App. at 9a. The Court concluded that although "[*a*]*rguably*, the department's two-day pay deduction from Sergeant Guzy would require him to be treated as a nonsalaried employee," the Department could avail itself of the "window of correction." Pet. App. at 9a (emphasis added). According to the legal conclusions of the Eighth Circuit, Sergeant Guzy's deduction was a unique, one-time deduction, whether intentional or not, and therefore, was not according to an established policy. The court further noted that the residency rule had been changed, without mention of the remaining unchanged 39 disciplinary rules. Pet. App. at 10a. The Court declared that Guzy's deduction fit within the "window of correction" because the deduction was " 'for reasons other than for lack of work.' " Pet. App. at 10a.

ARGUMENT

I.

THE FAIR LABOR STANDARDS ACT AND ITS SALARY BASIS TEST ARE A SAFETY MEASURE IN LAW ENFORCEMENT.

A stringent salary basis test which strictly limits the escape routes from a reasonable, well tailored hours of work standard is not simply or even primarily, intended to protect employee entitlement to overtime pay. The national hours of work standard is and always has been primarily a health and safety, and employment expansion regulation. At the turn of the last century, hours of work rules were upheld by this Court to protect women and children, *Muller v. Oregon*, 208 U.S. 412 (1908); *Howley v. Walker*, 232 U.S. 718 (1914), and to protect miners and railway workers, *Holden v. Hardy*, 169 U.S. 366 (1898); *Wilson v. New York*, 243 U.S. 332 (1917), and later to protect broader citizen access to the workplace and to safety in it once there. *United States v. Darby*, 312 U.S. 100 (1941). Today, no less than any other time in history, a national hours of work standard is crucial. Schor and Leete, "Assessing The Time Squeeze: Hours of Work in the United States, 1969-1989," 33 *Indus. Rel. L. J.* 25 (1994); Bureau of Labor Statistics, U.S. Department of Labor, 41 *Employment and Earnings* 67 (1994). Such a standard protects the safety of law enforcement officers and fosters the law enforcement goals they strive to achieve.

A. Crime and Crime Fighting Strategies, Hours of Work, and Law Enforcement Stress.

The increase in crime coupled with new anti-crime strategies call for more law enforcement hours of work on the street. With the increase in need for law enforcement in our

society, law enforcement officers experience an increase in hours of work and increased on-the-job stress. A strong national hours of work standard fosters both increased manpower and officer safety.

Crime. In relation to the amount of crime, the United States employs less than 10% of the police presence on the street than it did thirty years ago. In the 1960's the United States as a whole employed 3.3 police officers for every violent crime reported per year. In 1993, it had 3.47 violent crimes reported for every police officer. To return to the ratio of police to violent crimes we experienced in the 1960's, we would have to add approximately five million police officers to the street. Today, a police officer must deal with 11.45 times as much violent crime as his or her predecessor dealt with even two decades ago. *See* Adam Wallinsky, "The Crisis of Public Order," *The Atlantic Monthly*, 39 (July 1995).

By way of example, in Milwaukee in 1965, there were twenty-seven murders, thirty-three rapes, and 214 robberies. In 1990, when the population was smaller, there were 165 murders, 5,988 rapes and 4,472 robberies. In New Haven, Connecticut in 1960, only six murders, four rapes and sixteen robberies were reported. By 1990, when the population was reduced by 14%, New Haven reported thirty-one murders, 168 rapes and 1,684 robberies. *Id.* at 41. Unfortunately, these increases are reflected nationwide.

Anti-Crime Strategies: "Broken Windows" and Community Policing. Some reductions in crime have been experienced very recently. Compare, for example, cover stories from *Time*, "Law and Order: Why Cops Turn Violent," (April 1, 1991) and "Finally, We're Winning The War Against Crime: Here's Why" (January 15, 1996). Those reductions are the result of a slight increase in the numbers of officers and a large increase in their

hours on the street.[6] They also reflect the application of two seemingly opposing strategies — the "broken windows" theory dominant recently in New York City and the "community policing" theory dominant in Philadelphia, Los Angeles and elsewhere.[7]

The "broken windows" approach, initially developed in 1982 by Harvard's James Q. Wilson and Northeastern University's George L. Kelling, argues that minor violations create disorderly environments that encourage more serious

6. For example, a study performed by the Milwaukee Police Department revealed that while in 1988 the total overtime hours for the Department amounted to 119,137 hours, just five years later in 1993, the total overtime hours for the Department amounted to 176,824 hours. *See* Memorandum of Milwaukee Budget and Management Director (July 1993) (copy on file).

In 1987, the average overtime hours per police officer in a population with 1,000,000 or more citizens was 66.0 hours per year. U.S. Bureau of Justice Statistics, *Police Departments in Large Cities, 1987*, Special Report (1989). By 1993, the average officer in the Houston, Texas Police Department, where Sergeants are treated as non-exempt and receive overtime pay for example, worked more than 108 hours of overtime per year. Similarly the average Cincinnati, Ohio Police Officer, including Sergeants who are treated as non-exempt and receive overtime pay, worked in excess of 189 overtime hours. U.S. Bureau of Justice Statistics, *Law Enforcement Management and Administrative Statistics, 1993: Data for Individual State and Local Agencies with 100 or More Officers* (1995). The Houston officers worked an average of 179.3 hours per 28 day period, or more than an extra day per cycle. The Cincinnati officers worked an average of 185.5 hours per 28 day cycle or almost two days more than the FLSA hours of work standard which reflects the DOL's study of the average number of hours the average officer worked in 1975. For full national data, *see supra.* and Bureau of Justice Statistics, *Law Enforcement Management and Administrative Statistics, 1990: Data for Individual State and Local Agencies with 100 or More Officers* (1992).

7. National Institute of Justice, U.S. Department of Justice, *Community Policing For Safe Neighborhoods 2000: Partnerships for the 21st Century*, (1993).

crimes.[8] The analogy is to the abandoned building in which broken windows go unrepaired which soon deteriorates to the mile square slum. New York City Mayor Rudolph Giuliani and Police Commissioner William Bratton implemented a "broken windows" approach in May 1994 by mapping crime patterns and responding quickly and directly to even the smallest violations. The system is credited for a two year decline in crime in all New York precincts — murder is down 39%, auto theft 35%, robbery off by a third.[9]

Community policing or "problem oriented policing" developed, in large part, by University of Wisconsin's Henry Goldstein and fostered by the U.S. Justice Department's Office of Community Oriented Policing Services, takes what seems a different approach. It emphasizes putting more officers on the street, in the community, and on foot patrol. It fostered the Norman Rockwell "soda fountain/cop with a kid" model, night basketball, neighborhood improvement and police presence as crime prevention strategies. Cities and towns nationwide — including Boston, Houston, Philadelphia and Tulsa — are adopting community oriented policing.

The beat cop is back. Communities work to build rapport between law enforcement officers and neighborhoods. When the citizens of a neighborhood and their regularly assigned law enforcement officer know each other, it is more difficult to break the law. This theory puts more cops on the street and encourages

8. George L. Kelling and James Q. Wilson, "The Police and Neighborhood Safety," *Atlantic* 29 (March 1982); Wes Scogan, *Disorder and Decline: Crime and the Spiral of Urban Decay* (New York Basic Books) (1990).

9. *See* n. 8, *supra.*; and Richard Lacayo, "Finally, We're Winning The War Against Crime: Here's Why," *Time*, 48 (January 15, 1996)

their total involvement in the community.[10] Community Policing too has been effective. Madison, Wisconsin's south side reported a 14% reduction in property crimes between 1987 and 1989 under the program. A western Houston neighborhood recorded a 38% drop in serious crime over a six month period in 1988.[11] The Justice Department has found similar success to other cities.[12]

Whether a "broken windows" or "problem oriented" policing model is used, reformed policing involves pressure for more policing, more total hours on the street, more pressure on those in law enforcement and a greater need for protection against officer stress. Every law enforcement agency in which the FOP and the IUPA have members is struggling with both the crime problem and the remedial programs it generates. Everywhere cops are working harder, longer hours under increasing stress.

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10. *See, e.g.*, Wadman, Olson, *Community Wellness: A New Theory of Policing* (1990); Goldstein, *Problem Oriented Policing* (1990); Goldstein and Susmilch, *The Problem Oriented Approach to Improving Police Service, A Project on Development of a Problem Oriented Approach to Police Service* (1981); Green and Mastrofski, *Community Policing: Rhetoric or Reality* (1988); Kelling, *Police and Communities: The Quiet Revolution*, National Institute of Justice and Harvard (1988); Pierce, Spaar and Briggs, *The Character of Police Work* (1984); and Reiss and Tonry (eds.), *Communities and Police* (1986).

11. Lance Morrow, "Back to the Beat," *Time*, 22 (April 1, 1991).

12. *See* National Institute of Justice, *Problem-Oriented Policing*, (January 1987); National Institute of Justice, *Community Policing in Seattle: A Model Partnership Between Citizens and Police*, (August 1992); U.S. Department of Justice, Office of Community Oriented Policing Services, *Problem-Solving Tips A Guide To Reducing Crime And Disorder Through Problem-Solving Partnerships* (June 1996).

Longer Hours & Police Stress. Longer hours increase law enforcement stress and that stress undermines the very programs which the longer hours are attempting to improve. The officer that presses to do more and do it better is the officer most likely to succumb to stress. This Court recently recognized that "police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger." *Jaffee v. Redmond*, __ U.S. __, 116 S. Ct. 1923, n. 10 (1996).

Dr. Lawrence Blum, Ph.D., a clinical psychologist who has specialized in the treatment of law enforcement officer stress for over 16 years, has documented the dominant role that long and unpredictable work hours play in police stress. Dr. Blum conducted a study of Milwaukee's police officers. Blum, "Final Report Milwaukee Police Association, Interest Arbitration Hearing, City of Milwaukee 1994/1995 Labor Contract," 1994.[13] In the study, Dr. Blum received clinical data and questionnaire responses of approximately 1,000 police officers and conducted a review of the literature on stress, occupational stress, and police stress.[14]

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13. Report available from Dr. Lawrence N. Blum, Ph.D., Inc., Clinical Psychologist, 540 North Golden Circle Drive, Suite 115 Santa Ana, CA. 92705.

14. *E.g.*, White, Biggerstaff and Grubb, *Factors of Stress Among Police Officers*, 12 Criminal Justice and Behavior, 111 (1985); Singleton and Teahan, *Effects of Job Related Stress on the Physical and Psychological Adjustment of Police Officers*, 6 Journal of Police Science and Administration, 355 (1978); Heiman, *Suicide Among Police*, 134 American Journal of Psychiatry, 1286 (1977); Anson, and Bloom, *Police Stress in an occupational context*, 16 Journal of Police Science and Administration, 229 (1988); French, *A Comparative Look at Stress and Strain in Policemen* in *Job Stress and the*

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Exceedingly high percentages of officers reported experiencing continued and repeated stress reactions such as

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Police Officer: Identifying Stress Reduction Techniques (1975); Cooper, *Stress in the Police Service*, 24 Journal of Occupational Medicine, 30 (1982); Greller, *Police Stress: Taking a Department-Wide Approach to Managing Stressors*, The Police Chief, 44 (1982); Grencik, *The Physical Fitness of Deputies Assigned to Patrol Function and its Relationship to the Formulation of Entrance Standards*, LEAA Final Report (1973); Grenrick, *Towards an Understanding of Stress in Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Hageman, *Occupational Stress of Law Enforcement Officers and Marital and Familial Relationships*, 6 Journal of Police Science and Administration, 402 (1978); Hageman, *Responses of Police Rookie Officers to Stress*, 10 Journal of Police Science and Administration, 235 (1982); Johnson, *A Comparative Study of Stress Between Police Officers and Correctional Officers*, Master of Criminal Justice Thesis (1987); Kroes, *Psychological Stress and Police Work*, Paper presented at the Third Annual Symposium of the American Academy of Stress (1974); Kroes, *Society's Victim: The Policeman: An Analysis of Job Stress in Policing* (1975); Kroes, *Society's Victim: The Policeman* (1976); Kroes, *Job Stress and the Police Officer* (1975); Langone, *When Cops Crack Up*, Discover, 84 (1981); Lewis, *Toward an Understanding of Police Anomie*, 1 Journal of Police Science and Administration, 484 (1973); Maslach, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979); Niederhoffer, *The Police Family: From Station House to Ranch House* (1971); Selye, *Police Stress*, 1 Police Stress Magazine, 1 (1981); Skolneck, *A Sketch of the Policeman's Working Personality*, Criminal Justice-Law and Politics (1972); Sparrow, *Coronary Heart Disease in Police Officers Participating in the Normative Aging Study*, 118 American Journal of Epidemiology, 508 (1983); Speilberger, *The Police Stress Survey: Sources of Stress in Law Enforcment*, Human Resources Institute, (1980); Stratton, *Post-Traumatic Stress: Study of Police Officers Involved in Shootings*, Psychological Reports, 127 (1984); Tang, *The Effects of Hardiness, Police Stress, and Life Stress on Police Officers' Illness and Absenteeism*, 21 Public Personnel Management, 493 (1992); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 112 (1984); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 389 (1983); Wallace, *Stress and its Impact on the Law Enforcement Officer*, 4 Campus Law Enforcement Journal, 36 (1978). *See also* Standfast, "Focus on Stress: The Police Supervisor and Stress." *Prodigy Web Browser* (May 1996).

fatigue, even after rest, trouble falling asleep, multiple awakenings when trying to sleep, stiff painful feeling in muscles without injury, heart burn, being easily irritated or annoyed, feelings of nausea or sour stomach and backache or muscle spasm without injury. Dr. Blum found that these symptoms are caused by police officers' bodies excessive prolonged maintenance in a "fight or flight" condition in which the body secretes excessive adrenaline, noradrenaline, adrenocorticotropic hormone and cortisol.

In a follow up 1996 study, "The Impact of Hours of Work On Police Officers," Dr. Blum documents that these stress conditions are greatly aggravated by long and unpredictable hours.[15] A critical element of a program to remedy and control law enforcement stress is regular work hours and a standardized limited hours of work regime.[16]

15. Report Available from Dr. Blum, *see* n. 13 *supra*; *see also*, Martin Moore-Ede, M.D., Ph.D., *The Twenty Four Hour Society: Understanding Human Limits In A World that Never Sleeps* (1992). Dr. Moore-Ede explains that using overtime to perform additional work instead of bringing on new employees results in severe costs to the employer in terms of "increased fatigue and risk of human errors of inattention." *Id.* at 114. He explains that human fatigue as a result of working extended hours or shift work accounts for many serious accidents including Three Mile Island, Chernobyl, Exxon Valdez, numerous airline crashes and dozens of trucking accidents. *Id.* at 66-71. Finally, such hours result in increased societal health costs in increased gastrointestinal problems, chronic sleep disorder, cardiovascular disorder and other chronic illness. *Id.* at 70-75; *see also* Fairfax Coalition of Police study of *The Negative Effects of Rotating Shifts on Police Officers* (1991) (documenting more than 50 scholarly works addressing the physical and societal harms to working police officers from long, irregular, and unpredictable hours of work, including Colligan, "Extended Work Hours and the Compressed Work Week," National Institute for Occupational Safety & Health (1984); National Institute of Justice, *Police Work Schedules* (1990)).

16. The FLSA strict hours of work standard was Congress' chosen

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Individual police officers' health and the community's safety are inextricably tied to the hours of work of police officers. Just as the unhealthy and unsafe work hours of children and women fueled legislation, litigation, and Supreme Court precedent at the turn of the century; and, just as major issues in railway and mine safety brought hours of work issues before the court early in this century; the health and safety concerns surrounding modern day law enforcement issues bring the need for strict application of an hours of work standard in policing, with narrowly construed exemptions, to the Court now.

B. The Congressional Design of the FLSA Hours of Work Standard for Law Enforcement.

In 1974, recognizing the special needs of law enforcement and desiring to create a strong national hours of work standard for law enforcement, Congress ordered the Secretary of Labor to develop a special hours of work standard for law enforcement. 29 U.S.C. § 207(k). Accordingly, in place of the general national standard of a 40 hour work week, the Secretary developed a 171 hour in a 28 day cycle standard on the basis of an empirical study of the actual hours worked by American law enforcement in 1975.[17]

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method to "eliminate low wages *and long hours* . . . that were detrimental to the health and well being of workers." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947) (emphasis added); *see also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981); *see also* n. 15, *supra*.

17. In 1974, Congress amended the FLSA to apply in the public sector. P.L. 93-269 (1974). As part of those amendments, Congress ordered the Secretary to conduct a study within federal, state and local law enforcement to determine the appropriate national hours of work standard for law enforcement officers to be effective January 1, 1978. In 1976, however, the Supreme Court decided *National League of Cities v. Usery*, 426 U.S. 833 (Cont'd)

After this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Congress tailored the FLSA coverage of public safety employees to the particular concerns raised by public employers and employees in extensive hearings and congressionally sponsored negotiations between representatives of public employers and employees.[18] *See* P.L. 99-150, 99 Stat. 790 (1985). The Secretary of Labor played an active and significant role in that legislative process including agreeing to delay enforcing the *Garcia* decision until Congress formulated and passed the 1985 Amendments.

The carefully tailored amendments applied the longer more flexible 171 hour, 28 day law enforcement standard to state and local governments. Additionally, Congress allowed

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(1976) in which it struck down the 1974 amendments. Therefore, the Secretary conducted the study based upon federal law enforcement information only. The Court of Appeals for the D.C. Circuit found that the Secretary failed to abide by Congress' direction and ordered the Secretary to recalculate the hours of work standard using the information from state and local governments as well. *Jones v. Donovan*, slip. op. 79-2973, 25 W&H Cases 380 (D.D.C. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982). DOL then conducted a study in which it obtained both the scheduled hours and the overtime hours worked and combined this data with the federal data it had obtained to determine that police officers, on average, were working 171 hours per 28 day cycle. Significantly, in reaching this calculation, DOL considered the number of straight time *and overtime hours* worked for line officers, as well as for Sergeants and Lieutenants, in instances like St. Louis where Sergeants and Lieutenants spend at least 20% of their time in street level law enforcement work. *See* U.S. DOL, *Nonsupervisory Fire Protection and Law Enforcement Employees in State and Local Government*, Employment Standards Administration (Dec. 1979).

18. *See* H.R. Rep. 331, 99th Cong., 1st Sess. (1985); S. Rep. 159, 99th Cong., 1st Sess. (1985); *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985).

compensatory time under § 7(o), and incorporated a series of other special provisions for the public sector, including a twelve month compliance period during which public employers were relieved from liability. *Id.*

After its careful consideration of the special needs in the public sector, Congress did not create additional exemptions from the overtime provisions in § 13(a) of the Act. Congress, having been aware of the FLSA provisions and judicial enforcement thereof over the past 45 years, left the exemptions in place, including the Secretary's 1954 salary basis test and its disciplinary docking rule, as fully applicable to employees in the public sector.

C. FLSA Dual Goals of Expanded Work Force and Improved Working Conditions.

This case, by definition, only deals with the situation in which police officers must work in excess of the FLSA law enforcement hours of work standard of up to 171 hours over 28 days. 29 U.S.C. § 207(k). Unless an employee works in excess of that standard, it makes no difference whether he or she is exempt or non-exempt. To the degree employers claim that narrow application of the exemptions would be too costly, they are claiming that those sergeants and lieutenants will be working in excess of the hours of work standard, more than 11 hours per 28 days (or 4 weeks) beyond the 40 hour work week standard generally applicable in this country, more hours than the average police officer worked in 1975 (including overtime hours), more hours than the special upward adjusted standard mandated by Congress. If employers claim significant costs for work beyond the standard, it simply reflects work periods which are too long, added stress, less safety, less sound judgment by those sergeants and lieutenants who are closest to the firing line, and a removal of the intended incentive to hire more street level law enforcement officers.

The Supreme Court "consistently construe[s] the Act 'liberally to apply to the furthest reaches consistent with congressional direction' . . . recognizing that broad coverage is essential to accomplish the goal[s]. . . ." *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985). Exemptions are intended to be rare with the presumption that workers are exempt. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950). Perhaps the most serious difficulty with developing a broader exemption rule than has been historically applied, is that the benefit of the hours of work standard to the non-exempt, both in terms of individual officers' safety and employer encouragement to hire more employees, is diminished in proportion to the breadth of the group which is exempt. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (noting that liberalizing exemptions affect many more people than the workers directly at issue and circumvents the purposes of the Act). The importance of this principle can be best understood by a simple example.

Suppose a 100 officer law enforcement agency has a single chief and two captains who are exempted from the hours of work standard since they are charged with the executive and top internal managerial administrative work, as was intended under the Act. The remaining ninety-seven officers are covered by the hours of work standard. If the department finds that it has insufficient police coverage, the additional work must be performed by those 97% non-exempt employees. Those officers will be paid overtime at time and one-half which generates an economic motive to control overtime, to achieve superior management, to use the special 7(k) and comp time rules developed for law enforcement, (29 U.S.C. § 207(k) and (o)) and, failing all of that, to cause more officers to be hired to insure that sufficient officers are employed to safely do the work that must be done.

Now, suppose the same department, but a more liberal, less narrowly construed set of exemptions applies, all of the six working level lieutenants and the 24 working supervisor sergeants join the chief and two captains in the exempt category. Now, rather than 3% of the department being exempt, over 30% are exempt. When extra work needs to be done, none of the pressures intended under the Act's hours of work scheme come into play. The extra work can be, and will be, assigned to the mid-level lieutenants and sergeants without any additional overtime costs. The department will have no incentive to control the number of hours worked by the sergeants and lieutenants. The sergeants and lieutenants will bear the brunt of the increased stress without compensation for such burdens. The department will have no incentive to hire additional employees if significant additional work is needed. The hours of work standard and the purpose of the FLSA will be successfully avoided in that department.

Protecting Citizen Safety. The 171 hours over 28 day standard further protects the health and safety of Americans — not only the direct health and safety of the law enforcement officers covered by it, but also the safety of the broader society. As explained above, an hours of work standard in law enforcement is important to reducing the stress and pressure placed on working law enforcement officers. Society puts them in the line of fire. They are the nation's centurions. Not only are they entitled to the workplace health and safety protection of limited hours of work, it is also important that law enforcement officers are so protected because society arms them and grants them the power to use force to enforce its laws. The armed centurion on the streets of American cities must be as well rested and protected from stress as the engineers who drive our trains.

Expanding Workforce. The time and one half overtime provisions of the Act, the Congressionally selected method of insuring an hours of work standard, generates a market incentive

for hiring additional employees. This Court has recognized that a main purpose of the overtime provision is to "induc[e] the employer to reduce the hours of work and to employ more men." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 422, 423-24 (1945) (citations omitted). Again, in policing, enforcing the hours of work standard strictly, not only creates jobs for the departments of the *amici* organizations, it also aids in the general goal of increasing the numbers of trained, experienced, unstressed officers combating crime on the streets of our nation.

Compensating For Work Conditions. Overtime pay for excess hours increases the pay of those officers who are required to work long hours under increasing stress — a market society's method of repaying them for the sacrifice to their health and personal life. Congress and the Department of Labor has painstakingly determined the reasonable hours of work standard for law enforcement officers. As demonstrated by the studies cited above, work in excess of that standard places a severe physical and emotional toll on those employees. Congress appropriately has determined that they deserve additional compensation for that toll. *See Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 422, 424 (1945) (overtime pay serves Congress' purpose of "compensating the employees for the burden of a long workweek.") (citations omitted).

Fostering Cohesive Departments. Uniformity of a standard hours of work rule throughout the work force has a separate virtue of diminishing conflict and strife among employees and avoiding the perception of unfair treatment among workers. *See* The Stein Report, n.25 (1940), J.A. at 31. This goal is particularly important within law enforcement as agencies now move toward team policing. The transition to community or team policing has been inhibited when working supervisors and middle management do not support it. *See* George L. Kelling and William J. Bratton, *Implementing*

Community Policing: The Administrative Problem, U.S. Justice Dept. Perspectives on Policing (July 1993); "Community Policing and the Police Officer," 15 *Perspectives in Policing* 3 (Jan 1993). It will come to fruition only with the cooperation of working supervisors. Such cooperation should not be inhibited by disparate salary treatment. *See* Wiechmann, "Community Policing Exchange," Art. 9, *Officers Select Ideal Supervisors*, (March/April 1996).

Naturally, interdepartmental problems may arise between street officers and their Police Sergeants and Lieutenants as more hours of work are extended beyond the FLSA 171 hour standard. Police sergeants and lieutenants are subject to the same pressures, discipline and control by management as line officers; however, under the Eighth Circuit's rule, they must work beyond the established hours of work standard without the premium pay compensation which their subordinates have. This leads to the subordinate receiving more pay than the supervisor. *See* Trial Transcript, Vol. III (Sgt. Frederick testified subordinates make more than him), *see also*, Vol. IV pp. 25-26, 39, 54, 93. and J.A. at 59 (Chief Sheetz testifying that patrol officers with overtime can make more than their supervising sergeants). Contrary to the Act's intent, the premium pay entitlement of lower ranking officers creates pressure on management to assign all extra work to sergeants and lieutenants who are not entitled to any pay at all for overtime work.

This Court has long recognized that long hours contributes to workplace strife. One solution, according to the Court, is that "Congress may properly use [overtime pay] to lessen the irritations." *Overnight Motor Transportation Company, Inc. v. Missel*, 316 U.S. 572, 576 (1942).

II.

THE SALARY BASIS TEST IS A CRUCIAL COMPONENT TO PRESERVING THE NATIONAL HOURS OF WORK STANDARD FOR LAW ENFORCEMENT OFFICERS.

A. The Salary Basis Test and Its Disciplinary Docking Rules: Reasonable Standards and a Necessary, Objective Test of Exempt Status.

The salary basis test in 29 C.F.R. § 541.118(a) and the public sector salary basis test of 29 C.F.R. § 541.5d are reasonable. They provide a necessary and effective enforcement tool and an objective test of exempt status. *See* Kantor Report (1958), J.A. at 42 (salary test "simplif[ies] enforcement by providing a ready method of screening out the obviously nonexempt employees."); *Balgowan v. New Jersey Department of Transportation*, slip. op. 95-5276, 1996 App. LEXIS 11353 (3d Cir. 1996), *vacated for reh'g pending; Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending; Wisconsin v. Mueller*, 54 F.3d 438 (7th Cir. 1995), *cert. pending* (Case No. 95-586).

Further, the disciplinary docking rule is a tried and true indicator of non-exempt status. Since the 1940's, the Department of Labor has consistently concluded that truly exempt individuals, as they were intended by Congress, are not subject to disciplinary suspensions in pay of less than a pay period. *Compare*, Weiss Report (1949) J.A. at 39 (noting disciplinary deductions of executive, administrative and professional employees were a war time phenomenon and that "[s]uch deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.") *with* 57 Fed. Reg. 37666 (1992) (noting public employers can

discipline executive, administrative and professional employees in ways other than through short disciplinary deductions.). *See also*, Petitioners' Brief on the merits for full discussion of salary basis test's history, reasonableness and effectiveness.

B. The "Subject to" Docking Rule in 29 C.F.R. § 541.118(a) As A Practical Matter.

An employee is not salaried if he or she is subject to impermissible disciplinary deductions *as a practical matter.* The real test is not a choice between an unrealistic "merely hypothetical rule" (which the Eighth Circuit rejects) and an extreme "actual deduction rule" (which even the Eighth Circuit does not expressly accept).[19]

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19. *See* Petition for Certiorari, Table A. Since the petition for certiorari in this case was filed, the majority of the circuits rejecting the extreme "actual deduction" rule has grown. *See Yourman v. Dinkins*, slip. op. 95-7561, 1996 U.S.App. LEXIS 12544 (2d Cir. 1996), *cert. pending; Balgowan v. New Jersey Dept. of Transportation*, slip. op. 95-5276, 1996 U.S. App. LEXIS 11353 (3d Cir. 1996), *vacated pending reh'g.; Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*.

The weight of circuit court decisional law has swung sharply in favor of the stricter rule led by the Ninth Circuit in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) and the Third Circuit's *Balgowan v. New Jersey Dept. of Transportation*, slip. op. 95-5276, 1996 U.S. App. LEXIS 11353 (3d Cir. 1996), *vacated pending reh'g.* The Sixth Circuit also favors the majority holding explaining that when it is ambiguous whether an employee is "subject to" deductions, an actual deduction resolves the ambiguity. *Michigan Ass'n of Government Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993).

The extreme "actual deduction" rule is now supported by a shrinking minority comprised of only the Eighth Circuit in this case and the Fifth Circuit in *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991). The Eleventh Circuit, which had been viewed as supporting the minority role, *see Atlanta*

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This Court should endorse a practical test of whether the employees over whom exemption is claimed are, in the day-to-day workplace, in a practical way subject to disciplinary suspensions of less than a pay period. In this case, everyone — the Chief of Police (J.A. at 60, 62), the Internal Affairs Investigator (J.A. at 85), the employer's 30(b)(6) designees (J.A at 63-64), those directly commanding the petitioners (J.A. at 76), and the petitioners themselves (J.A. at 86) — knew that a real rule, actually enforceable against Sergeants and Lieutenants made petitioners subject to disciplinary deductions for part of a pay period.

The specific language of § 541.118(a) states that an employee is not salaried if he or she works under rules which "subject" the employee's compensation to a suspension without pay for less than a full pay period. The "subject to" test was not intended to cover "merely hypothetical" rules stored on dusty shelves which have no practical impact on the employee, but actual rules which are soundly in place and which everyone covered by the rule knows and complies with lest they be disciplined.

The Sixth Circuit has outlined the practical reasons for the rule —

> We choose to focus on the actual policy, rather than whether the policy has ever been administered for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee as one who is paid "a

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Professional Firefighters v. Atlanta, 920 F.2d 800 (11th Cir. 1991), now actually holds that even one impermissible deduction demonstrates that all similarly situated employees are "subject to" deductions. *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

predetermined amount which is not *subject* to reduction because of variations in the quality or quantity of his work." Also, this approach is more consistent with the general notion of a salaried employee; as the *Abshire* court stated "either pay is fixed and immutable, and not subject to deductions, or it is contingent." Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid these deductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reduction.

Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 86 (6th Cir. 1993).

The Sixth Circuit's logic is particularly appropriate to a police department where a disciplinary code is an important part of the para-military structure.

Entitling only those employees who actually suffer disciplinary deductions to overtime pay, while keeping it from those "subject to" an employer's intentional, well known, unrepudiated discipline code, but not deserving of discipline, would have the odd consequence of granting overtime pay protection only to those who engage in conduct for which they may be disciplined while keeping overtime pay protection from those who comply with the employer's rules and regulations.

C. The "Window of Correction" and Voluntary Employer Compliance.

True national implementation of the FLSA hours of work standard depends on broad voluntary employer compliance. The FLSA "window of correction" under 29 C.F.R. § 541.118(a)(6) should be open only when the employer has proven that any violations of the salary basis test were mistakes, that all deductions were reimbursed as soon as the employer discovered the mistakes, *and* that all of the rules, policies and practices pertaining to impermissible deductions have been changed.

If the "window of correction" opened more widely, as the Eighth Circuit below would open it, an incongruous situation would result. Employers could impose impermissible disciplinary deductions knowing that if challenged, they would avoid liability both retroactively and prospectively by simply promising to reimburse the employee, once finally ordered to do so by the courts, and promising to change the limited rules under which that employee was disciplined. Under the Eighth Circuit's rule, there would be no incentive for employers to abide by the rule and the FLSA's hours of work standard would be effectively and universally defeated.

CONCLUSION

For the foregoing reasons, the *amici*, the Grand Lodge of the Fraternal Order of Police, the International Union of Police Associations, AFL-CIO and their affiliates respectfully request that this Court reverse the decision of the Eighth Circuit.

Respectfully submitted,

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